SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-752

JAMES RUSSELL, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

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Petitioner prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming judgment of conviction by the United States District Court for the Western District of Virginia.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit affirmed the decision and judgment of the United States District Court for the Western District of Virginia, on October 18, 1974.

JURISDICTION

Jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. WHETHER THE SEARCH AND SEIZURE OF "CONTRABAND" WAS CONSTITUTIONALLY LAWFUL, IN THE ABSENCE OF A SEARCH WARRANT, AND AS AN INCIDENT WAS THERE PROBABLE CAUSE FOR ARREST AND SEARCH.

2. WAS THE DEFENDANT DENIED HIS CONSTITUTIONAL RIGHT OF DUE PROCESS, RESULTING FROM THE FAILURE OF THE DISTRICT COURT TO DIRECT A VERDICT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE FOR INSUFFICIENT EVIDENCE. INCIDENTAL THERETO, WAS NOT THE DEFENDANT THEREBY UNCONSTITUTIONALLY DEPRIVED OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS, BY VIRTUE OF THE COURT'S RULING.

3. WAS THE COURT IN ERROR IN DENYING A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE CASE, THEREBY DENYING HIM THE LEGAL AND CONSTITUTIONAL RIGHT NOT TO BE CONVICTED EXCEPT BY SUBSTANTIAL EVIDENCE BEYOND A REASONABLE DOUBT.

4. THE DECISION OF THE DISTRICT COURT AND THE COURT OF APPEALS AS TO THE SUFFICIENCY OF THE EVIDENCE IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THE SUPREME COURT OF APPEALS OF VIRGINIA, SQUARELY ON THE POINT.

5. THE STATUTE IS PATENTLY UNCONSTITUTIONAL IN THAT IT INVADES THE RIGHTS RESERVED TO THE STATES AND MAKES MERE "POSSESSION" A FEDERAL CRIME.

STATUTE INVOLVED

Accused was charged and convicted pursuant to Title 21, § 841(a)(1) of the United States Code, providing in material part as follows:

> 21—§ 841. Prohibited acts A—Unlawful acts
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

STATEMENT OF FACTS

The following is a brief review of the material facts involved.

Defendant James Earl Russell was charged as follows:

> "On or about the 1st day of November, 1973, in the County of Clark, in the Western Judicial District of Virginia, James Earl Russell knowingly and intentionally did possess with intent to distribute about 8750 grams of marijuana (hashish) a schedule I controlled substance in violation of Title 21 United States Code, Section 84(a)(1)."

He was tried and convicted by a jury. Subsequent thereto, after a probationary investigation, he was sentenced.

He appealed his conviction to the Fourth Circuit Court of Appeals, which affirmed on October 17, 1974.

Defendant is a 57 year old professor with a PhD in Political Science. He has no prior criminal record, and had an outstanding military record, having also served on the staff of the National War College. He

was at the time of his trial employed as a Professor at the Potomac Community College located in Paris, Virginia.

On October 23, 1973, five packages addressed to Dr. J. E. Russell, Paris, Virginia, 22130, were mailed from France, four from Paris, France, and one from Chamonix, France.

These packages were checked by a customs agent, upon an indicator by a dog trained to "scent" marijuana. A check of two of the packages revealed the presence of marijuana.

The packages were resealed, and forwarded to the Merrifield, Virginia, Postal Facility. There the postal authorities arranged with Agent McCracken of the BNDD for a "controlled" delivery. The state authorities were contacted by the agent.

The authorities arranged for a delivery of the packages to the local post office in Paris, Virginia. A notice was to go to the defendant advising that there were several packages there and he was to pick them up. At all times the packages and the defendant were under surveillance by state and U.S. agents.

Although the contents were known to the agents, and delivery was to be made as briefly described, the agents did not obtain from any magistrate or judge any search warrant or arrest warrant, although they had prepared a search warrant which was never presented to anyone authorized to issue same.

The defendant appeared at the post office in answer to the notice, and was given the packages by the postmistress, upon delivery of the notice. This was under police surveillance and pursuant to their instructions.

The packages in their sealed condition were placed in the defendant's vehicle, and he proceeded to his home, where he removed the packages, went in his home, remained five to ten minutes, and emerged with the packages. The packages were not opened or in any way disturbed from their original condition, by the accused. The packages were placed in the car. He then proceeded on Route 601, he determined to go back to the post office, and turned his vehicle around for that purpose. As he approached the intersection of Routes 50 and 601, he was stopped by armed state troopers, who ordered him to stop his car, get out with his hands up. He was arrested for transporting hashish.

There was not a scintilla of evidence by the prosecution that the accused ever opened any of the packages, knew of their contents, or that he in any way had caused or ordered the packages mailed to him. Further, there was no evidence of drug usage or involvement by the accused.

The arrest was made solely on the grounds that the packages contained contraband and were addressed to Dr. J. E. Russell, Paris, Virginia. The authorities had absolutely no other information concerning the accused or any other basis for the arrest.

A motion to suppress was timely filed and argued, in the District Court, which motion was denied.

Upon the conclusion of the government's evidence, a motion for a directed verdict of acquittal was argued due to the insufficiency of the evidence. This motion was denied.

Whereupon, the defendant put on evidence on his behalf, including his taking the stand. He denied any knowledge of the contents of the packages. He denied

he had anything to do with their being sent to him. He denied he ever opened the packages. He testified he was on the way back to the post office when he was arrested. He testified he had visited Europe, and Paris, France, that he had ordered books from the addressee publishing house, but had not done so recently, and that he was returning to the post office to inquire of the postmistress about the packages, when he was stopped, his car surrounded by officers, and arrested. He was surprised and perplexed about this.

At the close of the case, the court again denied a motion for directed verdict and the case was decided by the jury.

REASONS FOR GRANTING THE WRIT

1. The nature and scope of the questions involved are of imperative public importance composing substantial constitutional questions. The rights guaranteed by the U.S. Constitution regarding the Fifth and Fourteenth Amendments of due process, which are vital to every citizen.

2. The conflict between the highest court of Virginia and the federal courts in the same jurisdictional confines creates a compelling need for determination of this issue by this Court. Individual liberties are at stake.

ARGUMENT

POINT I

The Arrest, Search and Seizure, Violated Defendant's Constitutional Rights, Absent Probable Cause, for Arrest and/or Search Warrant.

The defendant, in the process of operating his vehicle, was stopped, arrested and searched. The justification was that he had in his automobile five sealed

packages containing hashish. These packages had been picked up at the local post office in response to a notice by the postal authorities that there were some packages at the post office addressed to him. The packages were in a sealed condition when the defendant appeared for them. It should be noted that this had been a "controlled" delivery by the authorities. They had previously inspected the contents and "set up" the controlled delivery, the purpose being to see what the defendant would do. Upon picking them up he placed them in his vehicle, drove to his home, and within a very few minutes, came back out with them and put them back in his car. During this entire period he was under constant observation by the police. The evidence clearly established that he did not open the packages, since the evidence indicated they were still in the same sealed condition when he was arrested.

The law is clear and fundamental that an arrest lies only on a showing of probable cause. [*Wong Sun* v. *U.S.*, 371 U.S. 471 (1963); *Johnson* v. *U.S.*, 333 U.S. 10 (1948). See also *Henry* v. *U.S.*, 361 U.S. 98 (1969); *Beck* v. *Ohio*, 379 U.S. 89 (1964).] And the burden rests on the government to show the existence of probable cause, for a warrantless arrest. [*U.S.* v. *Cleaver*, 402 F.(2d) 148 (1968); *Cervantes* v. *U.S.*, 278 F.(2d) 350.]

Here the government made no such showing. Absent any evidence of knowledge by accused of the contents of the packages, "probable cause" was artificially contrived, to provide a spurious arrest and search, and certainly tantamount to entrapment of the unwary.

If it can be argued that probable cause existed, then it was incumbent upon the government to have ob-

tained an arrest warrant and/or search warrant. However, they were well aware they could not get either, since a magistrate would require a showing of probable cause, and clearly there was none. [See *Rivera* v. *U.S.*, 321 F.(2d) 704, 708 (1963), F.R.C.P. Rule 4(a) and 4(b); Fourth Amendment of U.S. Constitution, and Rule 41(c) F.R.C.P.] See also *Giordenillo* v. *U.S.*, 357 U.S. 480 (1958).

The central issue, then, is: Can the authorities set up a delivery of contraband, absent any showing of involvement or knowledge by a suspect, creating thus an "artificial" basis for an arrest and search. Is this not violative of the fundamental constitutional and legal precepts? As this Court said in *Henry* v. *U.S.*, 80 S.Ct. 168, 361 U.S. 1, at p. 172:

> "... the fact that packages have been stolen does not make every man who carries one subject to arrest nor the packages subject to seizure ..."

Under our system suspicion is not enough for an officer to lay hands on a citizen. The mere fact of presence in a vehicle where there was stolen ration coupons did not waive constitutionally protected rights of search and seizure (*U.S.* v. *Di Re*, 332 U.S. 581). It seems that the government is in a dilemma of its own making.

If in fact there was probable cause then it's mandatory they have a search warrant and/or an arrest warrant, issued by a "neutral" detached magistrate (*Johnson* v. *U.S.*, 68 S.Ct. 369).

As pointed out in *Coolidge* v. *N.H.*, 403 U.S. 443, 450-51, 91 S.Ct. 2029:

> "Policemen simply cannot be asked to maintain the requisite neutrality with regard to its own investigations ..."

The government acknowledged they had no evidence of knowledge by accused as to the contents of the packages. To permit this type of a "contrived" setting makes a mockery out of the Fourth Amendment and the Fourteenth Amendment, and would revive the evils that preceded the passage of our Constitution, putting each citizen in the greatest jeopardy. Certainly that cannot and should not be tolerated.

POINTS II AND III

The Court Violated the Accused's Constitutional Rights by Failing To Direct a Verdict of Acquittal. As a Direct Incident Thereto the Accused Was "Legally" Coerced To Put on Evidence in His Behalf, in Violation of the Fourth and Fourteenth Amendments to the U. S. Constitution.

It is an elementary and fundamental rule of our criminal law that the burden of proof is on the government to prove all the elements of an offense beyond a reasonable doubt. One of the essential elements in the case at bar was that the accused was aware of the presence and was consciously and intentionally in possession of it. [91 ALR (2d) 813.] (Agobian v. U.S., 323 F.(2d) 693, cert. denied 375 U.S. 985, 84 S.Ct. 517) (Ewing v. U.S., 323 F.(2d) 674)

The government, in its case in chief, in material substance introduced evidence that five packages had been mailed from overseas, ostensibly to the accused. That these packages were intercepted, en route, and found to contain hashish. That the authorities were alerted. That a "controlled" delivery was to be made. That the postal authorities sent out a notice to the accused that five packages were at the local post office. The defendant appeared, picked up the packages, which were all sealed, and left. He went to his home, took the packages inside, came out in about five

minutes, placed the packages in his car, and left. The officers apprehended him, retrieved the packages, all still in the sealed condition. One package was opened at the scene by an officer. The defendant was arrested. He disclaimed knowledge of its contents. That the defendant could have been on the way back to the post office when he was arrested. The officers all admitted they had no knowledge of the sender of the packages or that the accused knew of the contents or that he had caused their mailing. They rested. A motion for directed verdict of acquittal was made and denied.

It is this ruling that, it is submitted, violated the rights of the defendant, constitutionally. Due process requires proof of every essential element. This is elementary. Absent any showing of "conscious" and intentional possession, the evidence fell short of the necessary burden. At this juncture the accused could rely on the constitutional and legal mandate as to the burden of proof. Once the court denied the motion, the defendant was placed in a dilemma. Does he rest, and put on no evidence? If he does then he is confronted with the practical effect of this to a jury. Although he has the legal and constitutional right to refuse to put on evidence and/or to testify, as a matter of common sense and human reaction, the jury would hold this against him. He therefore is legally coerced to give up a fundamental right. That of not having to put on any evidence, and not having to testify unless and until the government makes out a case by substantial evidence.

In *Barret* v. *U.S.*, 322 F.(2d) 292 (1963) the court, in reversing said:

> "It is said that so long as the defendant has preserved to him the right to fully present his defense,

> and then have the evidence weighed, he has nothing to complain of. But the right to make defense is not the whole right secured to one charged with crime. He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of guilt, and that the evidence shall be weighed by the jury and found sufficient to prove the case. It is his right to decline to produce any evidence and to stand solely upon the proposition that the state must prove a case against him. The rule in a criminal case is that the defendant cannot be compelled to go forward."

The court found that the defendant in effect, by virtue of presumption, was legally coerced to put on evidence in violation, thus, of the constitutional mandate.

We can argue, in an ultra sophisticate way, of the right to remain silent. *But,* as a practical matter, as the court, supra, pointed out, this is wishful thinking. We are dealing with human and practical reactions. The reality of life reduces the theoretical concept to just that, a nice abstract theory, but for all practical effect, disastrous. It's too late, after a conviction to say, I should have gone forward, including testifying in my behalf.

POINT IV

The Decision of the U.S. District Court and the Fourth Circuit Court of Appeals Is in Direct Conflict With the State's Highest Tribunal. Thereby Unconstitutionally Infirm.

By all the authorities, the burden of proof rested squarely on the government to prove, among other things, the essential element that the accused was aware of the presence and character of the particular substance and was consciously and intentionally in possession of it (91 ALR (2d) 813 and cases therein cited).

In the case at bar, all that was shown by the government was the picking up of packages as hereinbefore described. And as a matter of fact the only direct evidence on this point was by the accused denying any knowledge or complicity. The Supreme Court of Appeals of Virginia, on a factually similar case, to-wit: the receipt of a package, possession and arrest, in reversing, held in *Buono* v. *Com.,* 193 S.E. (2d) 798 (1973):

> "To establish 'possession' in a legal sense it is not sufficient to simply show actual or constructive possession of the drug by the defendant. The Commonwealth must also establish that the defendant intentionally and consciously possessed it with knowledge of its nature and character . . ."
> ". . . Legal possession requires proof beyond the naked possession of a package addressed to the accused."

This is substantive law, and certainly the federal courts should subscribe to it. To disregard it would mean that authorities could then go "court shopping," so to speak, in order to convict some accused. Without uniformity, the law is in a state of uncertainty and deprives the accused of his constitutional safeguards.

POINT V

The Statute Is Patently Unconstitutional in That It Invades the Rights Reserved to the States and Makes "Mere" Possession a Federal Crime, Absent Any Basis for Federal Jurisdiction.

Title 21 U.S.C. § 841 makes the "mere" possession with intent to distribute a controlled substance, a federal crime. There is no requirement of any involvement of interstate facilities or any other basis for fed-

eral jurisdiction. This violates the separability of federal-state jurisdiction, and invades the areas specifically left to the states. [*U.S.* v. *Bass*, 92 S.Ct. 515, 404 U.S. 336 (1971).] Therefore, the judgment of conviction is void, inasmuch as the federal jurisdiction was based on an unconstitutional statute. (See also *Ewing* v. *U.S.*, 323 F.(2d) 674.)

CONCLUSION

A serious question of constitutional proportions, as to procedures of arrest and search under the circumstances alleged, unconstitutionality of the statute, together with a compelling need for a decision by this court clarifying and making uniform state and federal decisions based on substantially the same evidence, requires that the writ be granted.

Respectfully submitted,

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